SUPREME COURT, U. S.

OCT 26 1970

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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 900

RAYMOND P. YORK and YVONNE J. YORK,
Petitioners,

VERSUS

BOARD OF EDUCATION OF INDEPENDENT SCHOOL DISTRICT 89,
OKLAHOMA COUNTY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

CLYDE J. WATTS
219 Couch Drive
Oklahoma City, Oklahoma 73102
Counsel for Petitioner

of Counsel:
DONALD N. BYKERK
14 N. Robinson
Oklahoma City, Oklahoma 73102

October 23, 1970

UTTERBACK TYPESETTING CO., 919 W. CALIF., OKLAHOMA CITY, PH. 232-0550

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In the
Supreme Court of the United States
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No. .....

RAYMOND P. YORK and YVONNE J. YORK,
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VERSUS

BOARD OF EDUCATION OF INDEPENDENT SCHOOL DISTRICT 89,
OKLAHOMA COUNTY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioners pray that a writ of certiorari issued to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered in the above case on July 27, 1970.

OPINIONS BELOW

No opinion was rendered by the District Court for the Western District of Oklahoma in entering its judgment, finding petitioners guilty of contempt of Court and entering a permanent injunction against them. This final order by the District Court is appended hereto at pages i to iii of the appendix. The opinion of the Court of Appeals for the Tenth Circuit has not yet been officially reported but

its opinion affirming the judgment of the District Court as modified is appended to this petition in the appendix at pages iv to x.

These proceedings have not heretofore been certified to the Attorney General by any court invoked herein as involving constitutional validity of an Act of Congress pursuant to 28 U.S.C. §2403.

JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was made and entered on July 27, 1970, which has been stayed pending this petition. Copy of the opinion and judgment entered therein and stayed are appended to this petition in the appendix at pages iv to x. Jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

CONSTITUTIONAL PROVISIONS, STATUTES AND FEDERAL RULES AND REGULATIONS INVOLVED

The pertinent portions of Articles I, II, III, IV and VI of the United States Constitution, as well as the Fifth, Tenth and Fourteenth Amendments thereto, are set forth in the appendix at pages x to xvi.

The pertinent portions of the United States Code, to-wit: 28 U.S.C. §1331, 28 U.S.C. §1343, 28 U.S.C. §1343, 28 U.S.C. §1651, 42 U.S.C. §1983, 42 U.S.C. §1985, 42 U.S.C. §1988, 42 U.S.C. §2000c (b) and 42 U.S.C. §2000c-6, are set forth in the appendix at pages xvi to xvii.

The pertinent portions of Oklahoma Statutes, 32 O.S.A. §9, 70 O.S.A. §4-5, and 70 O.S.A. §4-22, are set forth in the appendix at pages xxii to xxv.

QUESTIONS PRESENTED

The District Court for the Western District of Oklahoma had ordered the Oklahoma City Board of Education to adopt a plan of desegregation in the Oklahoma City School System and the Board had complied with this order. The history of this case is reported in *Dowell* v. *The School Board*, 219 F.Supp. 427, 244 F.Supp. 971, and *Board of Education* v. *Dowell*, 375 F.2d 158 (Tenth Circuit 1967), *cert. denied* 387 U.S. 936. Relevant portions of the record of that case were made a part of the record herein.

Petitioners refused to comply with the Board's plan and it then sought injunctive relief against petitioners in an action predicated upon jurisdiction being vested under Title 28 U.S.C. §§1331-1343, Title 42 U.S.C. §§1983-1985(2) and §1988, as well as the Fourth and Sixth Articles of the United States Constitution and the Fourteenth Amendment thereto. The District Court assumed jurisdiction and entered a preliminary injunction against the petitioners. Petitioners filed their answer and objected to this assumption of jurisdiction on the basis of (1) that original jurisdiction was not vested in the Federal Courts and (2) that the order in the *Dowell* case, used as the basis for the injunction herein, was an invasion of their constitutional rights by the judiciary and was contrary to law and void.

Petitioner Yvonne York refused to comply with the preliminary injunction while petitioner Raymond York filed a written statement of compliance with the District Court and thereafter took no affirmative action to defy the order. Upon hearing, the Trial Judge found both petitioners guilty of contempt of Court for violation of the preliminary

injunction and assessed a fine of $1,000.00 and thirty days in jail against each. At the same time, he made the preliminary injunction permanent. Upon appeal to the Court of Appeals of the Tenth Circuit, this judgment was modified and affirmed. The questions presented are:

1. Where Trial Court, for the obvious purpose of avoiding conflict with 42 U.S.C. 2000 c(b) and c-6, entered no order requiring assignment or transportation of students within the Oklahoma City School District, can that Court enforce, by contempt proceedings, the action of the Oklahoma City Board of Education, where no federal question is involved?

2. Does the Trial Court's order, requiring assignment and transportation of their child, based upon his race, violate petitioner's Fourteenth Amendment right to due process of law?

3. Do the Fifth and Fourteenth Amendments to the United States Constitution preclude a spouse from being held accountable for the action of the other upon the stated ground that he failed to testify in his own defense, denying the charge of contempt?

STATEMENT

This action arose by reason of petitioners' failure to enroll their fourteen-year-old son in his assigned school under a plan of desegregation adopted by the Oklahoma City School Board and approved by the District Court for the Western District of Oklahoma.

In May of 1969, the Oklahoma City School Board filed a plan of desegregation pursuant to Order of the District

Court. This plan was rejected and the Court's action effectively required the School Board to gerrymander attendance area boundaries so as to transfer students about and achieve racial balance; and, obviously required massive busing of students. The Board complied and the amended plan, including boundary changes, was approved in August, 1969, by the court.

Ray York, fourteen-year-old son of petitioners, lived and attended school in the Taft attendance area prior to the change; and because of his white race, was re-assigned to the Harding attendance area for the stated purpose of achieving racial balance. Petitioners refused to enroll their son in Harding Junior High School for the school term of 1969-1970, but did enroll him in Taft Junior High School, for school commencing September of 1970. Subsequently, this enrollment was terminated by the School Board but the petitioners' son continued to attend his classes, without recognition. This action was then brought by the School Board to enjoin petitioners from causing their son to attend Taft. A preliminary injunction was issued on the basis of the jurisdictional statement in the application, to which petitioners objected on the grounds that the Federal Court was enforcing an administrative order of the state entity, which was void by reason of 42 U.S.C. 2000c-(b) and c-6. After hearing, the Court continued the preliminary injunction in full force and effect, to which petitioners gave notice of appeal, but the Court refused to stay the same. Mr. York filed his compliance statement and took no further active part in this litigation. Mrs. York, on January 19, 1970, returned to Taft with her son for the purposes of returning him to class. At this point petitioners' son was taken into

custody and detained by the United States Marshal's office throughout the school day. He was then returned to his parents and thereafter did not attempt to attend any school in Oklahoma City. On January 23, 1970, the Trial Court held a hearing and made their temporary injunction permanent and, at the same time punished petitioners for contempt by a fine of $1,000.00 each, and imposed a jail sentence of thirty days upon each (Appendix p. iii). The petitioners gave notice of appeal and the contempt order was stayed. The permanent injunction remained in full force and effect and there has been no violation thereof.

REASON FOR GRANTING THE WRIT

The decision of the Court of Appeals should be reversed under Rule 19 of this Court for the following reasons:

1. The Court, in holding that an administrative subdivision of the Government of the State of Oklahoma, has a "federal right 'to be free from direct and deliberate interference with the performance of [a] constitutionally imposed duty' " is in direct conflict with the decision of the Court of Appeals for the Fifth Circuit in the case of *Congress of Racial Equality* v. *Clemmons*, 323 F.2d 54, which in turn is in conflict with the decision of the Eighth Circuit Court of Appeals in the case of *Brewer* v. *Hoxie School District No. 46*, 238 F.2d 91.

This implied constitutional "right" granted to a governmental body is such an important constitutional question as virtually to effect citizens of this nation; and certainly is a departure from accepted legal concepts as an-

nounced in *Collins* v. *Hardyman* (1951), 341 U.S. 651; *The Civil Rights Cases* (1883), 109 U.S. 3; *United States* v. *Harris* (1883), 109 U.S. 629; and *Peterson* v. *City of Greenville* (1963), 373 U.S. 244. This Honorable Court in the above cases, has held that the Fourteenth Amendment of the United States Constitution and statutes passed in furtherance thereto apply only to governmental action and not individual action, thereby implying that while individuals have rights under the Fifth and Fourteenth Amendments, government, whether it be local, state or federal, has no rights but only duties in reference thereto.

The Court of Appeals, even though admitting that "[t]he recalcitrance of one family hardly poses a threat to the duty, power and ability of the School Board to carry out the Federal Court decree," (Appendix page vi) nevertheless has degreed a "right to be free" from "interference" which artificially expands the concept of government in this country as established by the people, and amounts, in effect, to judicial legislation.

2. The jurisdictional questions raised by the issues of this case are of such vital importance to the nation and to the people as to require this Court to assume jurisdiction and settle the issues once and for all.

The Court of Appeals in affirming the lower court's judgment has overlooked a long line of decisions by this Honorable Court, which have held that jurisdiction of any given subject was statutory, and, without it being expressly conferred, the Trial Court had no other power but to dismiss the case, *Turner* v. *Bank of America*, 4 Dall. 8; *Sheldon* v. *Sill*, 8 How. 441; *Cary* v. *Curtis*, 3 How. 236; *Ex Parte McCardle*, 7 Wall. 506; *Lockerty* v. *Phillips*, 319 U.S. 182.

The Court of Appeals in ruling that the Trial Court had jurisdiction under 28 U.S.C. §1331 (Appendix page viii), has erroneously interpreted this provision and has permitted the exercise of jurisdiction by the Trial Court through the device of anticipating petitioners' defenses. This action is contrary to announced rules by this Honorable Court in the cases of *Gully* v. *First National Bank in Meridian*, 299 U.S. 109; *Devine* v. *City of Los Angeles*, 202 U.S. 313, and *The Fair* v. *Kohler*, 228 U.S. 22, requiring the complaint to state sufficient jurisdictional facts to vest jurisdiction, without reliance upon a defendant's anticipated defenses. This conflict is of sufficient magnitude to require this Court to exercise its jurisdictional powers to resolve the issue.

Petitioners have maintained throughout these proceedings that in view of 42 U.S.C. §2000c(b) and §2000c-6, the court had no legal power to require boundary changes or transportation of students to effect racial balance, but the Court of Appeals, in the instant case, has held that Congress had no right to frustrate constitutional provisions by such a statute. This decision is in conflict with *Ex Parte McCardle*, *supra*, where this Court acknowledged congressional power to deny a lower court's jurisdiction in habeas corpus matters.

The cause of action upon which the Trial Court acted herein is predicated upon a general order to desegregate, in a case to which petitioners were not a party, and with which the School Board had complied. Subsequent action by the Trial Court, requiring boundary changes and transportation of students, was contrary to the above cited statutes and therefore void. The subsequent contempt order, predicated thereon, is equally void. The Trial Court, by this

action, imposed its will contrary to congressional will, and, as such, invaded the legislative branch of government in violation of the separation of powers doctrine in the first three Articles of the United States Constitution. This action alone is such a departure from accepted legal principles as to require this Court to exercise its superior powers. The Trial Court's ordering an individual student to attend a specific school in order to achieve the racial balance required in a previous action is a direct violation of petitioners' individual freedom and liberties, granted by the Constitution and for this reason this Court should consider this issue, and protect the individual who refuses to comply with an administrative order issued in violation of the law as established by the Congress.

3. The Court of Appeals has erroneously interpreted the Fifth and Fourteenth Amendments of the United States Constitution so to overrule, in effect, Oklahoma Statutory Law which provides that one spouse cannot be held accountable for the actions of the other, 32 O.S.A. §9(1) (Appendix page xxii).

Petitioners have maintained throughout that, even if the decision of the lower court was correct in Mrs. York's case, it was totally incorrect in Mr. York's case. Raymond York had filed his compliance with the Court Order and the record discloses no evidence whatever that he took any other action, affirmative or negative.

The Fifth Amendment provides that no man shall be compelled to testify against himself and no presumption can arise from his failure to testify in his defense. Yet the Court of Appeals points out that "neither the father nor

mother testified," and "the father [did] not claim that he did anything to comply" with the order, and then assumes that he "condoned the violation by his wife" (Appendix page ix).

It is axiomatic that the burden of proof is upon the government to establish the contempt. Under the Fifth and Fourteenth Amendments a man is still innocent until proven guilty and the fact that someone else has violated a court order does not give rise to an assumption of guilt by association. The clear implication, if any, of Mr. York's statement of compliance is that he had requested his wife to refrain and she had indicated she would not. What could a husband then do? Must he forcibly control his wife and possibly break up his marriage? Petitioners respectfully suggest that the Oklahoma statute in question was passed for this very reason, to prevent internal conflicts between husband and wife, when the actions of one could possibly involve the other without his consent.

This issue presents a new and novel question to the Court involving serious questions of constitutional law which should be considered by the Court in its role of establishing the supreme law of the land.

CONCLUSION

The decision below should be reversed because it erroneously interprets the United States Code as it pertains to the prerequisites necessary for the assumption of jurisdiction by an inferior Federal Court, as well as the 1964 Civil Rights Act. It disrupts the orderly administration of executive departments. It permits encroachment by the judiciary

in an area committed by the Constitution of the United States and the statutes of the State of Oklahoma to legislative and administrative discretion. The Court of Appeals for the Tenth Circuit, in affirming the judgment of the District Court, even though modifying the sentences imposed upon the petitioners, totally disregarded decisions of this Court in conflict therewith and has decided a federal constitutional question in such a way as to be in conflict with applicable decisions of this Court and for the first time permits or sanctions "Federal rights" for a state governmental body. This is a complete departure from sound judicial thinking and prior decisions of this Court.

It is respectfully submitted, for the reasons set forth above, that certiorari should be granted.

CLYDE J. WATTS
219 Couch Drive
Oklahoma City, Oklahoma 73102
Counsel for Petitioner

of Counsel:
DONALD N. BYKERK
14 N. Robinson
Oklahoma City, Oklahoma 73102

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

BOARD OF EDUCATION OF INDEPENDENT SCHOOL DISTRICT NUMBER 89 OF OKLAHOMA COUNTY, OKLAHOMA,	)	
Plaintiff,	)	No. 69-551 Civ.
vs.	)	
RAYMOND P. YORK AND YVONNE J. YORK,	)	
Defendants.	)	

ORDER GRANTING PERMANENT INJUNCTION AND ORDER OF CONTEMPT FOR VIOLATIONS OF PRELIMINARY INJUNCTION

This cause came on for hearing on this 23rd day of January, 1970, upon plaintiff's Application for a Permanent Injunction; plaintiff appeared by its attorneys, J. Harry Johnson, Leslie L. Conner and James M. Little; the defendants, Raymond P. York and Yvonne York, appeared in person and by Clyde J. Watts; this cause also came on for further consideration of the Court to determine if the defendants have obeyed or violated the preliminary injunction issued by the Court from the bench on January 12, 1970, and reduced to writing on January 14, 1970, and served upon the defendants by the United States Marshal as shown by his Return thereon.

The parties appearing as aforesaid, the Court heard the evidence offered by the parties, the admissions made in open court and the argument of counsel, and upon full and due consideration thereof and being fully advised in the premises finds:

[APPENDIX]

1. The defendants, Raymond P. York and Yvonne York, husband and wife, and the natural parents of Raymond York, a minor, have and did, individually, and joint and severally, wilfully, knowingly, notoriously, publicly and intentionally, and in utter disregard of the Court's Order obstruct, impede and interfere with the Court's Order by taking to and encouraging and placing their said son, Raymond York, upon the school premises and in the classrooms of Taft Junior High School on January 12, January 15, January 16, and January 19, 1970, and have threatened to continue to do so in violation of the Court's Order, and the said Raymond York and his mother, Yvonne York, were intercepted on the school grounds of Taft Junior High School on January 19, 1970, as required by this Court's Order in order to prevent said Raymond York from continuing to attempt and in fact from attending Taft Junior High School, and said Raymond York was detained by the United States Marshal as required by this Court's Order until after school hours on January 19, 1970, and returned by the Marshal to his home.

2. The said defendants and their son, at the times mentioned above, lived in, and still live in the Harding Junior High School attendance area and not the Taft Junior High School attendance area; therefore, Raymond York was not legally in the Taft area as prescribed by the plaintiff School Board and heretofore approved by the Court.

Based upon the foregoing findings, the Court concludes that Raymond P. York and Yvonne York are each individually and jointly and severally in contempt of this Court because of the violations enumerated in the findings above.

IT IS THEREFORE ORDERED that the defendants, Raymond P. York and Yvonne York, be and each is adjudged in contempt of this Court for the violations above set out and enumerated; it is further adjudged, ordered and decreed that Raymond P. York be committed to the cus-

tody of the United States Marshal for the Western District of Oklahoma for a period of 30 days and a fine imposed upon Raymond P. York in the sum of $1,000.00; it is further adjudged, decreed and ordered that the defendant, Yvonne York be committed to the custody of the United States Marshal for the Western District of Oklahoma for a period of 30 days and a fine imposed upon Yvonne York in the sum of $1,000.00; the Marshal shall confine said defendants for the periods of time above set out; said defendants shall pay the fines imposed by this Order to the Clerk of the Court within 30 days from this date.

And now upon consideration of all of the evidence, admissions and arguments of counsel, and upon due and deliberate consideration of the facts and the law, it is

ORDERED AND DECREED that effective this day the defendants and each of them jointly and severally, are permanently enjoined from sending, permitting or attempting by any means whatsoever to permit or allow their son, Raymond York, to attend or attempt to attend, Taft Junior High School, or any other public school in the Oklahoma City School District other than Harding Junior High School, so long as they reside in the Harding Junior High School District or attendance area.

IT IS ORDERED that all pertinent oral and written Orders entered by this Court in the case of *Dowell* v. *School Board*, No. 9452 are referred to and made a part hereof.

Fail not under penalty of law.

Dated this 23 day of January, 1970.

Luther Bohannon

.....

United States District Judge

APPENDIX B

FILED
United States Court of Appeals
Tenth Circuit
JUL 29 1970
William L. Whittaker
Clerk

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

MAY TERM, 1970

BOARD OF EDUCATION OF INDEPENDENT SCHOOL DISTRICT 89, OKLAHOMA COUNTY,	)	
Plaintiff-Appellee,	)	No. 134-70
v.	)	
RAYMOND P. YORK and YVONNE J. YORK,	)	
Defendants-Appellants.	)	

Appeal from the United States District Court
for the Western District of Oklahoma
(D. C. 69-551)

J. Harry Johnson (Leslie L. Conner on the brief) for Appellee.

Clyde J. Watts (Donald N. Bykerk on the brief) for Appellants.

Before BREITENSTEIN, HILL and SETH, Circuit Judges.

BREITENSTEIN, Circuit Judge.

This appeal relates to another episode in the litigation over the desegregation of the Oklahoma City public schools. The district court entered a preliminary injunction requiring the appellants to send their 14-year old son to Harding school and none other in the public school system. The appellants violated the order and were cited for contempt. After an evidentiary hearing, the district court made the injunction permanent, found the appellants guilty of violating the preliminary injunction, and sentenced them to fine and imprisonment. On this appeal they attack both the validity of the injunctive orders and their contempt sentences.

On August 13, 1969, the federal district court in the case of Dowell v. Board of Education approved a School Board plan changing the attendance area for the Harding school during the 1969-1970 school year so as to include the residence of the appellants and their son. We vacated that order and Justice Brennan stayed our order. The Supreme Court on December 15 granted certiorari, vacated our order, and remanded the case. 396 U.S. 269. The August 13 district court order has remained in effect during the 1969-1970 school year.

Before the boundary change the appellants were in the attendance area of Taft school. After the change they insisted on sending their son to Taft. The Board notified them in writing that after the end of the first quarter, November 7, 1969, the unauthorized enrollment of their son at Taft had to be terminated. The appellants persisted in sending the boy to Taft. The Board then brought a suit in federal court for an injunction. The preliminary injunction was issued on January 14, 1970, and in addition to the matters mentioned it ordered the United States Marshal to determine if the boy attempted to attend Taft and, if he did so, to take him into custody, hold him during school hours, and then return him to his parents.

On January 15 and 16 the mother escorted the boy to Taft and he attended classes. On January 19 the two of them were intercepted by a deputy United States Marshal on the Taft school grounds and the boy was taken into custody as directed in the preliminary injunction and later released to his parents. On January 23, after a hearing, the court made the injunction permanent and found the parents in contempt.

The spectacle of a United States Marshal taking a 14-year old boy into custody for attempting to attend school does not appeal to us. Neither does the conduct of the mother in flaunting the orders of a federal court by producing an incident where the presence of representatives of the news media indicates action for publicity purposes. We have here an isolated occurrence which we believe could and should have been handled by the School Board without seeking the aid of the court. The recalcitrance of one family hardly poses a threat to the duty, power, and ability of the School Board to carry out the federal court decree.

Be that as it may, the federal court granted a preliminary injunciton and the appellants violated it. In Dunn v. United States, 10 Cir., 388 F.2d 511, we considered a situation wherein counsel for a litigant was held guilty of contempt for violation of a temporary restraining order. We held the temporary restraining order invalid in Hyde Construction Company v. Koehring Company, 10 Cir., 388 F.2d 501, cert. denied 391 U.S. 905. We also said that the invalidity of that order did not destroy the contempt conviction because the court had jurisdiction of the subject matter and the person and "its orders must be obeyed until reversed for error by orderly review." 388 F.2d at 513. In the case at bar, the parents did not seek review of the preliminary injunction. They chose to violate it. Accordingly, they were in contempt if the federal district court had jurisdiction.

The appellants insist that the district court lacked subject-matter jurisdiction. No good purpose would be served by any review of the many cases holding that segregated public education is a denial of equal protection and that federal courts have the duty and responsibility to prevent such discrimination. The history of the Oklahoma City school litigation has been detailed elsewhere and need not be repeated. It suffices to say that after our decision in Board of Education of Oklahoma City Public Schools v. Dowell, 10 Cir., 375 F.2d 158, cert. denied 387 U.S. 931, approving the pairing of certain schools to prevent segregation, the district court found that changed conditions would not produce the desired result and ordered the School Board to give further consideration to the matter. The School Board proposed a plan which made the boundary changes with which we are concerned and the court approved the plan. In so acting the court had subject-matter jurisdiction. That jurisdiction carries over to actions necessary and proper to effectuate the judgment entered.

Appellants say that the boundary changes are local administrative orders made under 70 O.S.A. § 4-22 and that the federal court has no jurisdiction with regard thereto. The argument overlooks the fact that the School Board is under a duty to obey the Constitution, U. S. Const., Art. VI, cl. 2, and the order of the district court. It has a federal right "to be free from direct and deliberate interference with the performance of the constitutionally imposed duty." Brewer v. Hoxie School District No. 46, 8 Cir., 238 F.2d 91, 99. Cf. Bohlander v. Independent School District Number One of Tulsa County, Oklahoma, 10 Cir., 420 F.2d 693, 694. The right arises under the Constitution and is within the jurisdictional grant of 28 U.S.C. § 1331. We note in passing that no question is raised over the jurisdictional amount, and that the district court expressly found that it was present.

So far as the merits of the injunctive orders are concerned, the appellants make a collateral attack on the validity of the district court orders in the underlying case. It is not necessary to discuss again those orders. The order approving the Board's plan for boundary changes was valid and effective during the 1969-1970 school year. Only one aspect thereof need be mentioned. The appellants contest the orders on the ground that they are not a proper exercise of jurisdiction by the district court. The injunction was "necessary and appropriate" in the aid of the court's jurisdiction over the underlying segregation problems. See the All Writs Act, 28 U.S.C. § 1651.

The appellants point out that federal district court jurisdiction is statutory and rely on provisions of the 1964 Civil Rights Act as prohibiting the action taken. See 42 U.S.C. § 2000c et seq. Section 2000c(b) says that desegregation "shall not mean the assignment of students to public schools in order to overcome racial imbalance." Section 2000c-6(a)(2) provides that nothing in the Act empowers a federal court to "issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance." Nothing in the 1964 Act forbids the court to approve a School Board plan instituting boundary changes designed to eliminate unconstitutional discrimination. In any event, the quoted provisions cannot be interpreted to frustrate the requirements of the Constitution. United States v. School District 151 of Cook County, Illinois, 7 Cir., 404 F.2d 1125, 1130. The equitable powers of the federal courts exist independently of the 1964 Act. United States v. Jefferson County Board of Education, 5 Cir., 372 F.2d 836, 880, affirmed en banc, 380 F.2d 385, cert. denied 389 U.S. 840. Whatever may be the ultimate effect of the mentioned provisions of that Act on the problem of school desegregation, we find nothing therein which inhibits the boundary changes in the circumstances existing

in Oklahoma City. We are convinced that both the preliminary and permanent injunctions were valid and should have been obeyed.

The appellants admit that Yvonne J. York refused to comply with the preliminary injunction and continued to cause her son's attendance at the Taft School. They contend that the father, Raymond P. York, did not violate the order and they rely on the provision of 32 O.S.A. § 9(1) that "[n]either husband nor wife, as such, is answerable for the acts of the other."

The preliminary injunction restrained the appellants from sending their son to Taft, ordered them to remove him from Taft, and ordered that if the son attended the Oklahoma City school system he do so at Harding. The father filed a statement in which he "advises the Court of his intent to comply, under protest with Court's Order; and further respectfully suggests that the Defendant, Yvonne J. York has not joined in this compliance and does not intend to be bound thereby." Neither the father nor the mother testified at the contempt hearing. The preliminary injunction imposed an affirmative burden on both to send their son to Harding rather than Taft if he continued in the public schools. The father does not claim that he did anything to comply therewith. Instead, he stood by and apparently condoned the violation by his wife. His failure to obey the order was his own act, not that of his wife. The district court properly held him in contempt.

The district court imposed a sentence of 30 days in jail and a $1,000 fine against each defendant. This is in clear violation of 18 U.S.C. § 401 which provides that a court may punish a criminal contempt "by fine or imprisonment." It cannot sentence to both. See In re Bradley, 318 U.S. 50, 51, and In re Osborne, 9 Cir., 344 F.2d 611, 616. On May 22, 1970, the district court corrected the erroneous sentences by eliminating the jail term and imposing a $1,000 fine on each. The appeal was then pending in this

court. Ordinarily when a case is appealed the district court loses jurisdiction over it. Aune v. Reynders, 10 Cir., 344 F.2d 835, 841. We need not consider whether this rule is changed by the provision of Rule 35, F.R.Crim.P., which authorizes the correction of an illegal sentence at any time, because we have both the authority and responsibility to determine that the power to punish for contempt is not abused and to revise contempt sentences when necessary. Cheff v. Schnackenberg, 384 U.S. 373, 380, and Green v. United States, 356 U.S. 165, 188.

From a consideration of all factors present, we are convinced that the penalties imposed are harsh and excessive. Accordingly, the sentence of Raymond P. York is reduced to, and fixed at, a fine of $250 and that of Yvonne J. York is reduced to, and fixed at, a fine of $500. In each case the payment of the fine shall be upon execution.

The injunctive orders and the adjudications of contempt are affirmed. The case is remanded to the district court for the imposition of the fines which we have mentioned. Each party will bear his own costs.

APPENDIX C

ARTICLE I, CONSTITUTION OF THE UNITED STATES, USCA CONSTITUTION ARTICLES I § I TO ARTICLE I § VIII, CLAUSE III.

Section 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.*

*The rest of the sections of Article I are not pertinent hereto.

ARTICLE II, CONSTITUTION OF THE UNITED STATES, USCA CONSTITUTION ARTICLES I §I TO ARTICLE I §VIII, CLAUSE III

Section 1. The executive Power shall be vested in a President of the United States of America.*

*The rest of the sections of Article II are not pertinent hereto.

Article III, Constitution of the United States, USCA Constitution Articles III to VII.

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their continuance in Office.

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Am-

bassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Section 3. Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

ARTICLE IV, CONSTITUTION OF THE UNITED STATES, USCA CONSTITUTION ARTICLES III TO VII.

Section 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

Section 2. The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

No person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

Section 3. New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

Section 4. The United States shall guarantee to every State in this Union a Republican Form of Government, and shall

protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

ARTICLE VI, CONSTITUTION OF THE UNITED STATES, USCA CONSTITUTION, ARTICLES III TO VII.

All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

AMENDMENT V, CONSTITUTION OF THE UNITED STATES, USCA CONSTITUTION AMENDMENTS I TO V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life,

liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT X, CONSTITUTION OF THE UNITED STATES, USCA CONSTITUTION AMENDMENTS VI TO XIV.

The powers not delegated to the United States by the Constitution nor prohibited by it to the States, are reserved to the States respectively, or to the people.

AMENDMENT XIV, CONSTITUTION OF THE UNITED STATES, USCA CONSTITUTION AMENDMENTS, VI TO XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the Laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male

citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

APPENDIX D

STATUTES

28 U.S.C. §1331

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interests and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff. June 25, 1948, c.646, 62 Stat. 930; July 25, 1958, Pub. L. 85-554, §1, 72 Stat. 415.

28 U.S.C. §1343

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote. June 25, 1948, c. 646, 62 Stat. 932; Sept. 3, 1954, c. 1263, §42, 68 Stat. 1241; Sept. 9, 1957, Pub. L. 85-315, Part III, §121, 71 Stat. 637.

[APPENDIX]

42 U.S.C. §1983

CIVIL ACTION FOR DEPRIVATION OF RIGHTS

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. §1985

CONSPIRACY TO INTERFERE WITH CIVIL RIGHTS—PREVENTING OFFICER FROM PERFORMING DUTIES

(1) If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district, or place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties;

OBSTRUCTING JUSTICE: INTIMIDATING PARTY, WITNESS OR JUROR

(2) If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, pre-

sentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; of if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

DEPRIVING PERSONS OF RIGHTS OR PRIVILEGES

(3) If two or more persons in any State or Territory conspire to go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators. R.S. §1980

[APPENDIX]

42 U.S.C. §1988

PROCEEDINGS IN VINDICATION OF CIVIL RIGHTS

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. R.S. §722.

42 U.S.C. §2000c(b)

"Desegregation" means the assignment of students to public schools and within such schools without regard to their race, color, religion, or national origin, but "desegregation" shall not mean the assignment of students to public schools in order to overcome racial imbalance.

42 U.S.C. §2000c-6

CIVIL ACTIONS BY THE ATTORNEY GENERAL—COMPLAINT; CERTIFICATION; NOTICE TO SCHOOL BOARD OR COLLEGE AUTHORITY; INSTITUTION OF CIVIL ACTION; RELIEF REQUESTED; JURISDICTION; TRANSPORTATION OF PUPILS TO ACHIEVE RACIAL BALANCE; JUDICIAL POWER TO INSURE COMPLI-

ANCE WITH CONSTITUTIONAL STANDARDS; IMPLEADING ADDITIONAL PARTIES AS DEFENDANTS

(a) Whenever the Attorney General receives a complaint in writing—

(1) signed by a parent or group of parents to the effect that his or their minor children, as members of a class of persons similarly situated, are being deprived by a school board of the equal protection of the laws, or

(2) signed by an individual, or his parent, to the effect that he has been denied admission to or not permitted to continue in attendance at a public college by reason of race, color, religion, or national origin,

and the Attorney General believes the complaint is meritorious and certifies that the signer or signers of such complaint are unable, in his judgment, to initiate and maintain appropriate legal proceedings for relief and that the institution of an action will materially further the orderly achievement of desegregation in public education, the Attorney General is authorized, after giving notice of such complaint to the appropriate school board or college authority and after certifying that he is satisfied that such board or authority has had a reasonable time to adjust the conditions alleged in such complaint, to institute for or in the name of the United States a civil action in any appropriate district Court of the United States against such parties and for such relief as may be appropriate, and such court shall have and shall exercise jurisdiction of proceedings instituted pursuant to this section, provided that nothing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance, or otherwise enlarge the existing power of the court to insure compliance with constitutional standards. The Attorney Gen-

eral may implead as defendants such additional parties as are or become necessary to the grant of effective relief hereunder.

PERSONS UNABLE TO INITIATE AND MAINTAIN LEGAL PROCEEDINGS

(b) The Attorney General may deem a person or persons unable to initiate and maintain appropriate legal proceedings within the meaning of subsection (a) of this section when such person or persons are unable, either directly or through other interested persons or organizations, to bear the expense of the litigation or to obtain effective legal representation; or whenever he is satisfied that the institution of such litigation would jeopardize the personal safety, employment, or economic standing of such person or persons, their families, or their property.

"PARENT" and "COMPLAINT" defined

(c) The term "parent" as used in this section includes any person standing in loco parentis. A "complaint" as used in this section is a writing or document within the meaning of section 1001, Title 18. Pub. L. 88-352, Title IV, §407, July 2, 1964, 778 Stat. 248.

32 O.S.A. §9

1. Neither husband nor wife, as such, is answerable for the acts of the other.

2. The separate property of the husband is not liable for the debts of the wife contracted before the marriage.

3. The separate property of the wife is not liable for the debts of her husband, but is liable for her own debts, contracted before or after marriage.

4. No estate is allowed the husband as tenant by courtesy, upon the death of his wife, nor is any estate in dower allotted to the wife upon the death of her husband. R. L. 1910, §3357; Laws 1945, p. 122, §3.

70 O.S.A. §4-5

Every school district shall be a body corporate and shall possess the usual powers of a corporation for public purposes by the name and style of "Independent (or Dependent, if it is a dependent school district) School District Number —— (Such a number as may be designated by the county superintendent of schools) of ———— (the name of the county in which the district is located, or if lying in more than one county the name of the county whose county superintendent of schools has jurisdiction) County, Oklahoma," and in that name may sue and be sued and be capable of contracting and being contracted with and holding such real and personal estate as it may come into possession of by will or otherwise and as authorized by law. The supervision of a school district lying in more than one county shall remain with the county that had such supervision as of July, 1958, except that, upon a majority vote of the school district electors voting at the annual school district meeting or at a special school district meeting called for such purpose, the supervision of a school district lying in more than one county may be changed to the county superintendent of schools of any one of the counties represented in said district. Said change shall be effective upon the first day of July next succeeding the date of such meeting. It shall be the duty of the clerk of the board of education of said school district to notify the State Superintendent of Public Instruction, and the county superintendent of schools of each of the counties represented in said school district, that such a change has been made, within ten (10) days after said meeting; but failure to make such notification shall not prevent such change from going into effect at the time hereinabove provided. Laws 1949, p. 528, art. 4, §5, as amended Laws 1959, p. 321, §4.

70 O.S.A. §4-22

The board of education of each school district shall have power to elect its own officers; to make rules and regulations, not inconsistent with the law or rules and regulations of the State Board of Education, governing the board and the school system of the district; to maintain and operate a complete public school system of such character as the board of education shall deem best suited to the needs of the school districts; to designate the schools to be attended by the children of the district; to provide and operate, when deemed advisable, cafeterias or other eating accommodations, thrift banks or other facilities for the teaching and practice of thrift and economy, book stores, print shops, vocational and other shops, to purchase, construct or rent, and operate and maintain, classrooms, libraries, auditoriums, gymnasiums, stadia, recreation places and play grounds, teacherages, school bus garages, laboratories, administration buildings, and other schoolhouses and school buildings, and to acquire sites and equipment therefor; to have school district property insured; to acquire property by condemnation proceedings in the same manner as land is condemned for railroad purposes; to dispose of property no longer needed by the district by sale, exchange, lease or otherwise; to purchase necessary property, equipment, furniture and supplies necessary to maintain and operate an adequate school system; to incur all expenses, within the limitations provided by law, necessary to carry out and fulfill all powers herein granted, to contract with and fix the duties and compensation of physicians, dentists, optometrists, nurses, attorneys, superintendents, principals, teachers, bus drivers, janitors, and other necessary employees of the district and pay their necessary travel expenses, and pay necessary travel expenses of members of the board of education; and to exercise sole control over all of the schools and property of the district, subject to other provisions of the Oklahoma School Code. Provided, that the

boards of education of two (2) or more school districts may enter into cooperative agreements and maintain joint programs including but not limiting to courses of instruction for handicapped children; courses of instruction in music and other subjects; practical instruction for trades and vocations; practical instruction in driver training courses; and health programs, including visual care by persons legally licensed for such purpose, without favoritism as to either profession. Provided, further, that any school district may operate or maintain a school or schools on any military reservation which is within the boundaries of such school district or which is adjacent to such school district, and provide the instruction in such school or schools to children of personnel on the military reservation; and in doing so shall conform to all Federal laws and requirements. Laws 1949, p. 532, art. 4, §22, as amended Laws 1953, p. 375, §5; Laws 1955, p. 447, §1; Laws 1955, p. 421, §12.